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No. 85-633

IN THE

Supreme Court of the United States

October Term, 1985

AMREP CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF AMREP CORPORATION

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This case presents the need for review by this Court to resolve important issues, as to which the Circuit Courts are in conflict, regarding the scope of the power granted by Congress to Respondent, the Federal Trade Commission ("FTC") under Section 5 of the FTC Act, 15 U.S.C. § 45. The Solicitor General does not dispute the importance of the issues presented, but has attempted, by a series of erroneous arguments, to diminish their significance.

1. In arguing that the decision below is consistent with the relevant case law (Opp. Brief, p.9), the Solicitor General has not cited any authority which is germane to the issue. In *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), the Court held that the FTC did not have the power under § 5 of the FTC Act to declare an act previously accepted as lawful to be "unfair" and simultaneously recast the consequences of conduct occurring prior to the entry of

* Reference is made to the Petition for information concerning Petitioner's affiliates.

its order. None of the cases cited by the Solicitor General even address that issue.

2. The Solicitor General (Opp. Brief, p. 9 n 10) attempts to justify the FTC's retroactive invalidation of the so-called forfeiture clause by asserting that the use of such a clause had been limited by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(d). However, § 1703(d) does not prohibit the use of such clauses, but simply requires that use of a clause providing for forfeiture of more than the greater of 15 percent of the purchase price or the amount of the seller's actual damages must be coupled with the grant to the buyer of a two-year right to rescind the contract. More significantly, § 1703(d) was not enacted until 1979 -- long after the overwhelming majority of Petitioner's contracts were executed -- and was given *prospective* application only. Consequently, that statute imparted no notice to Petitioner at the time of execution of its land sale contracts that they might subsequently be determined to be "unfair" under § 5 of the FTC Act.

3. The Solicitor General attempts to distinguish this case from *Heater* by arguing (Opp. Brief, p. 11 n 11) that the FTC's Order does not prevent Petitioner from recovering damages against a contract purchaser in default or from pursuing other remedies. However, the Solicitor General cites no legal authority to support that argument, and has perhaps overlooked the fact that paragraph V.C. of the Order (App. B., p. 31a) prohibits Petitioner from suing to recover moneys due from a purchaser in default. As noted in the Petition (p. 4), Petitioner's land sale contracts do not contain a promise by the purchaser to pay any money, nor do they provide any remedy to Petitioner other than that specified in the so-called forfeiture clause, which the FTC has abrogated.

Although the FTC found that Petitioner's overhead and sales costs amounted to approximately 40% of the contract price (App. B, p. 117a), and permitted Petitioner to retain its actual costs in connection with the default of a purchaser under any contract executed after the FTC's Order becomes final (App. B, p. 27a),

the Order contains no similar provision with respect to existing contracts, which are left in limbo. Thus, in order to free its land from a contract with a defaulting purchaser, Petitioner would be compelled to provide a refund. Accordingly, the FTC has by circumvention achieved the result proscribed by *Heater*, while paying lip service to that decision. The statement in the Opposition Brief (p. 11 n 12) that "[w]e do not acquiesce in the view of the Commission's authority adopted in *Heater*" is amply supported by the result achieved below.

4. The argument by the Solicitor General (Opp. Brief, p. 10) that the Order is addressed to future conduct is purely semantical. An order directing a respondent to cease and desist from retaining moneys paid under a pre-existing contract or from refusing to refund moneys previously paid thereunder would also purport to be directed to future conduct. However, the restrictions intended by Congress on the power of the FTC to order retroactive relief would be nullified if the form of the order, rather than its substantive impact, were determinative. The substantive effect here is the nullification of contract rights created before Petitioner was put on notice that the use of its contract clauses would be deemed to be in violation of federal law, and the reformation of Petitioner's contracts.

5. The Solicitor General (Opp. Brief, p. 13) has misconstrued *Congoleum Ind., Inc.* v. *CPSC*, 602 F.2d 220 (9th Cir. 1979), and *Barrett Carpet Mills* v. *CPSC*, 635 F.2d 299 (4th Cir. 1980), in asserting that they are not in conflict with the decision below. In those cases the Ninth and Fourth Circuits, respectively, held that notification to past purchasers could not be compelled under § 5 of the FTC Act. The fact that those cases also involved orders providing for the recall of products is inapposite to the issue here. The holdings in those cases that § 5 does not confer the power to order notification to past purchasers are independent of the holdings that § 5 does not authorize recall orders, and squarely conflict with the decision below. "We . . . find no authority . . . for an order of recall *or* of notification." *Barrett Carpet Mills, supra*, 635 F.2d at 302 (emphasis added).

It may also be noted that the conflict between the Fourth and Ninth Circuits, on the one hand, and the Tenth Circuit, on the other hand, is particularly significant in light of the fact that respondents in FTC proceedings generally have a wide latitude in choosing the Circuit to which to petition for review of an FTC order. Section 5(c) of the FTC Act (App. D, p.146a) provides for review of FTC orders

> "in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business. . . "

Hence, given a choice, respondents burdened by FTC orders requiring notification would be well advised to petition to the Fourth or Ninth Circuit and to avoid the Tenth Circuit. Such potential for forum shopping is in itself a sufficient basis to resolve the conflict among the Circuits here.

6. Finally, the Solicitor General's interpretation of § 5 would make § 19 of the FTC Act, 15 U.S.C. § 57b, superfluous. If the FTC has the power under § 5 to order notification to past purchasers and the reformation of contracts, what is the purpose of § 19? It is submitted that relief of that nature, which the Solicitor General concedes is "retroactive relief" (Opp. Brief, p. 12 n 13) can *only* be obtained in a proceeding under § 19 -- in which the FTC must prove to a court that the act or practice "is one which a reasonable man would have known under the circumstances was dishonest or fraudulent," 15 U.S.C. § 57b(a)(2).

It is that proof which satisfies the due process requirement for the imposition of retroactive relief -- a person who intentionally commits a dishonest or fraudulent act can hardly claim unfair surprise when subsequently directed to remedy his wrongful act. Such proof is not required in a § 5 proceeding, and that is the reason, as more fully articulated by the *Heater* Court, why Congress refused to authorize the FTC to order retroactive relief in a § 5 proceeding. A fair reading of the statutory scheme in light of the Congressional history compels the conclusion that the FTC

acted without authority here in ordering notification to Petitioner's past purchasers and the reformation of Petitioner's contracts executed prior to the time Petitioner was given notice that the use of a commonly-used contract clause would be deemed to be in violation of federal law.

The conflict among the Circuits here is real and irreconcilable and involves an important issue of federal law, having substantial due process implications, which should be resolved by this Court.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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